

SERVED: March 6, 1996

NTSB Order No. EA-4427

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 20th day of February, 1996

_____	)	
Application of	)	
	)	
Bennie B. Finnell	)	
	)	Docket 201-EAJA-SE-12649
for an award of attorney and	)	
expert consultant fees and	)	
related expenses under the	)	
Equal Access to Justice Act	)	
(EAJA).	)	
_____	)	

**OPINION AND ORDER**

The applicant has appealed from the written initial decision Administrative Law Judge William A. Pope, II, served on May 26, 1995, denying his application for attorney fees and other expenses under the Equal Access to Justice Act (EAJA, 5 U.S.C. § 504) on the ground that the applicant was not a prevailing party entitled to an EAJA award.<sup>1</sup> As discussed below, we deny applicant's EAJA appeal and affirm the law judge's initial decision.

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<sup>1</sup>A copy of the law judge's decision is attached.

The underlying action for this EAJA appeal is a June 12, 1992 order issued by the Administrator that suspended applicant's commercial pilot certificate for 150 days for his alleged low flight in a helicopter on June 3, 1991. The Administrator contended that applicant's operation spooked several horses in the area, resulting in injury to one or more of them and endangering 13 year-old Charlynn Vickers, who was riding one of the horses at the time. The Administrator charged applicant with violating 14 C.F.R. §§ 91.119(d) and 91.13(a) of the Federal Aviation Regulations (FAR).<sup>2</sup> Applicant contested the Administrator's suspension order. While admitting that he flew his helicopter in the area on the date in question, he denied that it was his helicopter that had created the hazard to the

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<sup>2</sup>FAR sections 91.119(d) and 91.13(a) read as follows:

**91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

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(d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for the helicopters by the Administrator.

**91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

horses and to Ms. Vickers.<sup>3</sup>

The law judge found that applicant had violated both sections of the FAR as charged by the Administrator.<sup>4</sup> In reaching that conclusion, the law judge, inter alia, credited the testimony of the Administrator's witnesses, who testified, among other things, that the helicopter was only about 25 feet from Ms. Vickers when it flew over her. However, the law judge reduced the Administrator's suspension order from 150 to 30 days. Subsequently, we affirmed the law judge's findings and conclusions. See Administrator v. Finnell, NTSB Order EA-4217 (1994).

Applicant contends that even though the Administrator's charges were sustained, he is the prevailing party for EAJA purposes because he obtained a reduction in the sanction to a suspension period he tried to negotiate before the hearing. Applicant cites our holding in Gilfoil v. Administrator, NTSB Order No. EA-3982 (1993), in support of his contention that he is entitled to EAJA fees. In this connection, applicant contends that the law judge erred in finding Gilfoil distinguishable from his case.<sup>5</sup> We disagree.

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<sup>3</sup>The purpose of applicant's flight was to survey property, currently being used as a pasture, that contained an unused landing strip and two hangers. Applicant intended to land and inspect the hangers as a possible storage site for his helicopter.

<sup>4</sup>Law Judge Pope did not preside over the hearing on the merits. He was assigned the case after the law judge at the time of the hearing retired.

<sup>5</sup>The Administrator filed a reply brief opposing applicant's

The EAJA requires the government to pay certain attorney fees and other specified costs to a prevailing party unless the government establishes that it was substantially justified in its position or that special circumstances would make an award unjust. 5 U.S.C. § 504(a)(1). To establish "substantial justification" the government must "...show (1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it propounds; and (3) that the facts alleged will reasonably support the legal theory advanced." McCrary v. Administrator, 5 NTSB 1235, 1238 (1986), citing United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1985). The relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Court phrased this test as requiring a "reasonable basis both in fact and law." Id.

For purposes of this EAJA appeal, we must address the second and third steps to the above-mentioned analysis to determine whether the Administrator was substantially justified in pursuing a 150-day suspension.<sup>6</sup> As the following discussion indicates, our final conclusion is that, assuming, arguendo, the applicant

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appeal for EAJA fees.

<sup>6</sup>The Administrator by prevailing at hearing has established the first element of substantial justification to litigate this matter; namely, that a reasonable basis in truth did exist for the facts alleged. Applicant does not contest this point.

was a prevailing party on the matter of sanction, the Administrator was substantially justified both in law and in fact for seeking a 150-day suspension of applicant's certificate. Id.

Accordingly, we will not disturb the law judge's denial of an award for EAJA fees.<sup>7</sup>

Low-flight cases involving helicopters have resulted in a wide range of administrative sanctions being upheld. We have previously stated that the severity of the sanction must be viewed in light of the circumstances surrounding the low flight violation. See Administrator v. Cobb & O'Connor, 3 NTSB 98, 101

(1977). The following sanctions issued to airmen operating a helicopter at an unsafe low altitude illustrate this point:

Administrator v. Tur, NTSB Order EA-3458 (1991), revocation for airman who operated helicopter at hazardous low altitude over a burning pier; Administrator v. Tur, NTSB Order EA-3490 (1992), 180-day suspension for same airman who operated helicopter at low altitude within a restricted area over a downed fighter jet thus endangering relief workers; Administrator v. Harrington, NTSB Order EA-3767 (1993), 90-day suspension for airman whose helicopter was hit by a wave and crashed into the water as passengers were attempting to unload onto a stranded barge; and Administrator v. Lewis, 5 NTSB 879 (1986), 60-day suspension for

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<sup>7</sup>The law judge ruled that the applicant was not a prevailing party because the Administrator's charges were substantially justified. He apparently concluded that the applicant was not a prevailing party on the matter of sanction because it was clear that the applicant would have contested the charges even if a lesser sanction had been sought.

airman who landed helicopter on a gravel parking lot that endangered others from blown debris. Given such precedent, it does not appear that the Administrator should have reasonably anticipated that a 150-day suspension for the low-flight violations sustained would be deemed excessive. Moreover, in our judgment, the actual endangerment that applicant's inexcusable failure to properly reconnoiter the landing area created is clearly an aggravating circumstance justifying more than a minimal sanction.<sup>8</sup>

Additionally, we reject applicant's contention that he is the prevailing party for EAJA purposes based upon our holding in Gilfoil. In that case, we awarded EAJA fees where the airman demonstrated that he was not contesting the underlying factual basis for the FAR violations, but was contesting the Administrator's revocation order which he argued was too severe.

We noted: "Consequently, the litigation is fairly understood as litigation over sanction, and in this contest applicant clearly prevailed." Id. at p. 4. Contrary to applicant's position, we agree with the law judge's determination that applicant's case on its face is distinguishable from Gilfoil in that applicant fought

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<sup>8</sup>The Administrator did not appeal the law judge's decision to reduce the length of suspension to 30 days. We note, nevertheless, that the Board is bound by the Administrator's written sanction policy guidance as well as all validly adopted interpretations of laws and regulations, see 49 U.S.C. § 44709(d)(3) (1994), and that the Administrator's order suspending applicant's certificate for 150 days falls within the range of 30 to 180 days for low-flight violations set forth in the Enforcement Sanction Guidance Table. See Compliance and Enforcement Program, Appendix 4 at p. 17.

the factual basis for the FAR violations throughout.<sup>9</sup> See Initial Decision and Order Denying EAJA Fees, at pp. 3-4. Moreover, since the Administrator was justified as discussed above in seeking a 150-day suspension on the allegations in the complaint, it is of no consequence, for EAJA purposes, that the law judge concluded that a lesser suspension would be sufficient.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's appeal is denied; and
2. The law judge's order denying the application for an EAJA award is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup>Applicant asserts that since he tried to settle the case before hearing for a 30-day suspension, denying him EAJA fees punishes him for taking the case to hearing. We have no occasion to evaluate the merits of this argument, for the record does not present an adequate basis for determining the extent or nature of whatever settlement efforts may have taken place prior to the hearing, or which party was the initiator of them.